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90-1781

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

ALFLEX CORPORATION

Petitioner,

v.

UNDERWRITERS LABORATORIES, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Statement Pursuant to Rule 29.1

Petitioner Alflex Corporation has the following parent company: ADF, Inc. ADF, Inc. is owned by two entities: AEA Investors and Prudential Bache.

Petitioner Alflex Corporation has no subsidiaries.

QUESTIONS PRESENTED FOR REVIEW

1. Whether Section 43(a) of the Lanham Act, which authorizes civil actions in cases involving false designation of origin and false descriptions of goods, is limited to actions between competitors.

2. Whether Blatty v. New York Times Company, 42 Cal. 3d 1033, 232 Cal. Rptr. 542 (1986), cert. denied, 45 U.S. 934 (1988) improperly creates a new First Amendment privilege with respect to false advertising and unfair competition claims.

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I.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit relating to the Lanham Act and unfair competition claims of petitioners was filed on September 10, 1990. The opinion was not for publication. It is reprinted at P. 1 of the Appendix ("A-1").

II.

JURISDICTION

The Court of Appeals for the Ninth Circuit entered its Opinion relating to Petitioner's Lanham Act and unfair competition claims on September 10, 1990. On September 24, 1990, Alflex Corporation filed a timely "Petition for Rehearing and Suggestion for Rehearing En Banc." On December 20, 1990, the

United States Court of Appeals for the Ninth Circuit entered an order denying the Petition for Rehearing and Suggestion for Rehearing En Banc." This order is reprinted in the Appendix at A-25. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. Section 1254(1).

III.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The principal Constitutional provision involved is the First Amendment.

The principal statute involved is the Lanham Act, Section 43(a) (15 U.S.C. Section 1125(a)), as amended November 16, 1988. The statute is reprinted at p. A-27 of the Appendix. The statute as amended is reprinted at p. A-29 of the Appendix.

IV.

STATEMENT OF THE CASE

Alfex Corporation ("Alflex") is a manufacturer of electrical conduit. In 1968, Alflex submitted a flexible metal electrical conduit product to Underwriter's Laboratories, Inc. ("UL"), the nation's largest certification company, for product listing. UL thereafter developed a standard for flexible electrical conduit. On February 19, 1969 UL, listed Alflex's flexible metal electrical conduit. In the mid 1970s, a third-party, the Carlon Company, developed a flexible plastic electrical conduit which it submitted to UL for testing. On May 15, over the objections of members of its advisory council, UL announced that it would list and apply its certification mark to Carlon's flexible plastic electrical conduit despite the fact that the product did not meet the same standards required of other flexible electrical

conduits, such as Alflex's metal electrical conduit. On May 26, 1987, Alflex brought suit against UL seeking damages and injunctive relief for violation of the Lanham Act, breach of contract, negligence, unfair competition, and other claims.

V.

HOW THE FEDERAL QUESTION AROSE BELOW

The jurisdiction of the District Court was invoked under Section 43(a) of the Lanham Act (15 U.S.C. Section 1121), and under 28 U.S.C. Section 1332 because of diversity of citizenship, the plaintiff being a citizen of California and the defendant a citizen of Delaware.

REASONS FOR GRANTING THE WRIT

I.

In Its Opinion The Ninth Circuit Held That Competition Is Necessary In Order To Assert A Claim Under The Lanham Act, Thereby Creating A Conflict Both With Prior Ninth Circuit Decisions And Decisions In Other Circuits.

In its Opinion, the Ninth Circuit did not address its previous decision in Smith v. Montoro, 648 F.2d 602 (9th Cir. 1981). In that case, the Ninth Circuit rejected the contention that Section 43(a) of the Lanham Act is limited to actions between competitors. Defendants there contended that plaintiff could not sue because he was "not in any sort of competition" with them. Id. at 607. The Ninth Circuit held unequivocally that "a plaintiff under Section 43(a) need not be in actual competition with the alleged wrongdoer." Id. Rather, "the dispositive question is whether the party has a

reasonable interest to be protected against." Id. at 605, 608 (quoting New West Corp. v. NYM Co. of California, Inc., 595 F.2d 1194, 1198 (9th Cir. 1979)). The Ninth Circuit concluded that even though plaintiff and defendants were not competitors, plaintiff could sue because he alleged an injury to his business interests. Id. at 608.

In its Opinion, the Ninth Circuit relies on Halicki v. United Artists Communications, Inc., 812 F.2d 1213 (9th Cir. 1987) and completely ignores Smith v. Montoro. To the extent Halicki requires that the parties be in competition, it is in direct conflict with Smith v. Montoro.[1] All other Circuits

[1] In fact, Halicki does not require that the parties be in competition, but rather "to be actionable conduct must not only be unfair but must in some discernable way be competitive." 812 F.2d at 1214. The Court held that summary judgment was proper because the plaintiff had failed to present any evidence (until appeal) of competitive injury. Lamothe v. Atlantic Recording Corp., 847 F.2d 1403

(continued...)

that have considered the issue have concluded that Section 43(a) is not limited to actions between competitors. See, e.g., Dovenmuehle v. Gilldorn Mortgage Midwest Corp., 871 F.2d 697, 700 (7th Cir. 1989); Berni v. International Gourmet Restaurants of America, Inc., 838 F.2d 642, 648 (2nd Cir. 1988); Cammel Hair and Cashmere Inst. v. Associated Dry Goods, 799 F.2d 6, 11 (1st Cir. 1986); Thorn v. Reliance Van Co., 736 F.2d 929, 933 (3d Cir. 1984); see also, Gold Seal Co. v. Weeks, 129 F. Supp. 928, 940 & n.34 (D. D.C. 1955), aff'd sub nom S.C. Johnson & Son Inc. v. Gold Seal Co., 230 F.2d 832 (D.C. Cir.) (per curiam), cert. denied, 352 U.S. 829 (1956).

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[1](...continued)
(9th Cir. 1988) also only held that actionable conduct must be "competitive." Indeed, the Court in Lamothe concluded that plaintiffs had standing to sue every defendant, even those with which plaintiff did not compete, since plaintiffs established a "legitimate interest in protecting their work." 847 F.2d at 1406.

Thus, the Ninth Circuit not only avoided reference to a prior contradictory decision within the Circuit, but it held, contrary to all relevant precedent, that the parties must be in competition in order to support a Section 43(a) claim. A Writ of Certiorari is necessary in order to decide the appropriate standing requirements in the Ninth Circuit and to conform those standing requirements to those enunciated in other Circuits.

II.

The Panel Incorrectly Held That the First Amendment Prohibits False Advertising and Unfair Competition Claims.

For the first time, the Ninth Circuit has construed Blatty v. New York Times Company, 42 Cal. 3d 1033, 728 P.2d 1177, 232 Cal. Rptr. 542 (1986), cert. denied, 485 U.S. 934 (1988) to bar, on First Amendment grounds, claims under state law

unfair competition statutes (specifically, sections 17200 and 17500 of the California Business and Professions Code).

It is inconceivable and unprecedented that the First Amendment restrictions enunciated by the Ninth Circuit apply in a context (such as unfair competition or false advertising) bearing no resemblance to defamation. The Ninth Circuit has now recognized a First Amendment privilege never before recognized by any court. The Opinion did so by misapplying Blatty. Blatty involved an action for trade libel, unfair competition, and other claims arising from alleged false statements by a major newspaper. 42 Cal. 3d at 1036. The Court held that the false statements could not reasonably be understood as referring to plaintiff, since the statements on their face concerned a group having "substantially more than twenty-five members." Id.

at 1046. Plaintiff therefore did not satisfy the First Amendment requirement that defamatory falsehoods be "of and concerning" plaintiff to be actionable. Id. The court further held that each of the plaintiff's causes of action must be dismissed because each "has as its gravamen the alleged injurious falsehood . . . and hence must satisfy First Amendment requirements." Id. at 1048.

In applying Blatty's holding that First Amendment requirements "apply to all claims whose gravamen is the alleged injurious falsehood of a statement," 42 Cal.3d at 1042 (emphasis added), the Ninth Circuit interpreted "injurious falsehood" to mean any falsehood containing injury. If so interpreted, however, Blatty is plainly wrong. The First Amendment has never been a bar to numerous common law and statutory causes of action for false representation even if the alleged falsehood is not "of

and concerning" plaintiff. Obvious examples include common law fraud, misrepresentations in violation of federal securities laws, and false advertising in violation of the Lanham Act. See, e.g., Schroeder v. Auto Driveway Co., 11 Cal. 3d 908, 917, 114 Cal. Rptr. 622 (1974) (common law fraud); Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 467 (1977) (fraudulent appraisal in violation of Rule 10b-5); American Brands, Inc. v. R.J. Reynolds Tobacco Corp., 413 F. Supp. 1352, 1354 (S.D.N.Y 1976) (false advertising in violation of Section 43(a)). Such falsehoods have no special First Amendment protection. See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

For Blatty to be consistent with settled law, it must be interpreted as using "injurious falsehood" to mean a falsehood causing injury to reputation; i.e., a defamatory falsehood. This is correct because:

(1) Blatty's progenitor, Rosenblatt v. Baer, 383 U.S. 75 (1966), was a defamation action[2]; (2) Blatty introduces the phrase "injurious falsehood" in connection with describing the gravamen of a defamation action (42 Cal. 3d at 1042); (3) requiring that a falsehood be "of and concerning" a person is sensible when the falsehood allegedly injures that person's reputation, but pointless in all other contexts; (4) such an interpretation is consistent with Blatty's goal of preventing a plaintiff from circumventing First Amendment requirements by labeling a defamation claim as something else (42

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[2] Rosenblatt held that a government may not sue someone for making a statement that libels the government but is not on its face "of and concerning" the official, unless the official shows through "extrinsic proof that the statement referred to him." 383 U.S. at 81.

Cal. 3d at 1042); (5) no court has extended Blatty to privilege non-defamatory falsehoods.[3]

III.

The Ninth Circuit Opinion Incorrectly Ignored the Recent Amendment to the Lanham Act.

The Lanham Act was amended effective November, 1989 to provide, in pertinent part:

"(a) Any person who or in connection with any goods or services, or any

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[3] See Dong v. Board of Trustees, 191 Cal. App. 3d 1572, 1587, 236 Cal. Rptr. 912 (1987), cert. denied, 484 U.S. 1019 (1988); Basilius v. Honolulu Publishing Co., 711 F. Supp. 548, 552 (D. Haw.), aff'd mem, 888 F.2d 1394 (9th Cir 1989); Dworkin v. Hustler Magazine, Inc., 668 F. Supp. 1408, 1417 n.11 (C.D. Cal. 1987), aff'd, 867 F.2d 1188 (9th Cir.), cert. denied, 107 L. Ed 2d 26 (1989); Hudson v. Guy Gannett Broadcasting Co., 521 A.2d 714, 715 n.2 (Maine 1987); Saenz v. Morris, 106 N.M. 530, 746 P.2d 159, 162 (N.M. App. 1987).

container for goods, uses in commerce any word, term, name, . . . which –

. . .

(2) In commercial advertising or promotion, misrepresents the nature, characteristics, qualities or geographic origin of his or her or another person's goods, services or commercial activities, shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act." (Emphasis added.)

The Ninth Circuit did not discuss the applicability of this amendment to the specific issues raised in its decision, stating only: "This Act was amended effective November 1989. We need not decide, however, whether to apply the amended version of Section 43(a) to this appeal. The

amendment does not affect the District Court's or our analysis of this issue." See opinion at A-8, n.1.

However, the amendment clearly affects the very issue involved in this case; i.e., whether the misrepresentation of another person's goods gives rise to a Section 43(a) claim. The reason the amendment was not considered by the District Court is that it was not effective at the time the District Court granted summary judgment in March 1989. Despite several questions in oral argument concerning the applicability of the amendment to this case, the Ninth Circuit Opinion disregards it.

The applicability of the amendment presents a question of exceptional importance overlooked in the Opinion. If the amendment applies, then Alflex is entitled to proceed with its claim.

CONCLUSION

For the above-stated reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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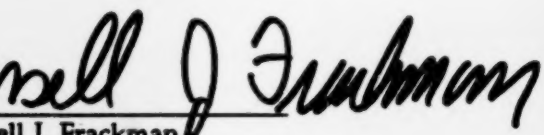
By: 
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APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALFLEX CORPORATION,	)	No. 89-55440
	)	
Plaintiff-Appellant,	)	D.C. No.
	)	CV 87-3344 JGD
vs.	)	
	)	
UNDERWRITERS LABORATORIES, INC.,	)	
	)	
Defendant-Appellee.	)	

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted June 6, 1990
Pasadena, California

Before: BROWNING and PREGERSON, Circuit Judges, and MACBRIDE, District Judge*

* The Honorable Thomas J. MacBride, United States District Judge for the Eastern District of California, sitting by designation.

Alflex Corporation (Alflex) appeals summary judgment for Underwriters Laboratories (UL) on all of Alflex's claims. We affirm.

BACKGROUND

Alflex manufacturers flexible aluminum conduit, a building material designed to hold and protect electrical wiring. Because of its flexibility and durability, the product can be used in coils and quickly installed by pulling it through and around obstructions. Alflex's flexible aluminum conduit is UL-approved.

UL is a nonprofit testing and certification organization that assesses products for possible hazards to life and property. UL lists certified products in directories which are consulted and

relied upon by consumers and by state and municipal electrical inspectors.

In its assessment and testing procedures, UL customarily refers to the National Electrical Code (NEC) to design performance standards for the products submitted to it. The NEC is sponsored as a model code by the National Fire Protection Association (NFPA) and has been widely adopted by states and municipalities.

The controversy in this case concerns UL's testing and certification of a flexible plastic conduit manufactured by Carlon, an Alflex competitor. Carlon's product is capable of being used like the Alflex product in some applications. Although the plastic product can be used like the aluminum product, UL certified the plastic material without requiring it to meet the same performance standards

as the aluminum conduit. In UL's judgment, this was not necessary, because the two products would not be listed under the same section of the NEC nor approved entirely for the same uses. UL argues that it properly certified the flexible plastic conduit in accordance with an article of the NEC covering pliable plastic conduit, rather than flexible metal conduit. UL contends that it has met its obligations to Alflex and has acted within its rights to determine which products merit certification.

Alflex asserts, however, that UL's listing of Carlon's product and the application of the UL label to Carlon's product constitute a false representation and description. Alflex contends that the UL listing has an established meaning that the product is covered by the NEC, that established standards for comparable products have been applied, and that under those established standards, the product is

safe. Alflex contends that Carlon's product was not covered by the NEC and that it was not required to meet the same safety requirements as Alflex's flexible aluminum conduit. Thus, Alflex asserts that UL's listing of Carlon's product is a false representation that results in a competitive injury to Alflex.

The district court granted summary judgment for UL on all of Alflex's claims, consisting of: 1) violation of 15 U.S.C. § 1125(a) (false representation under the Lanham Act); 2) breach of contract under California law; 3) breach of the covenant of good faith and fair dealing under California law; 4) negligence under California law; 5) unfair competition under Cal. Bus. & Prof. Code § 17200; 6) false advertising under Cal. Bus. & Prof. Code § 17500; 7) failure of UL to control its mark, giving Alflex a right to have the mark canceled under 15

U.S.C. § 1064(e)(1) (Lanham Act, § 14). Alflex appeals.

STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. Kruso v. International Telephone & Telegraph Corp., 872 F.2d 1416, 1421 (9th Cir. 1989), cert. denied, 58 U.S.L.W. 3801 (1990); State Farm Fire and Casualty Co. v. Martin, 872 F.2d 319, 320 (9th Cir. 1989). Our review is governed by the same standard used by the trial court under Fed. R. Civ. P. 56(c). Darring v. Kincheloe, 783 F.2d 874, 876 (9th Cir. 1986). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. Tzung v. State Farm Fire and

Casualty Co., 873 F.2d 1338, 1339-40 (9th Cir. 1989); Judie v. Hamilton, 872 F.2d 919, 920 (9th Cir. 1989).

DISCUSSION

I. Violation of Section 43(a) of the Lanham Act

As stated above, Alflex argues that UL's listing of Carlon's product created a false representation that Carlon's product is covered by the NEC and that it met the same performance requirements as Alflex's product. Alflex asserts that this listing constitutes actionable "false representation" under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).[1]

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[1] At the time Alflex brought the suit, 15 U.S.C. § 1125(a) (1982) provided in pertinent part:

> Any person who shall affix, apply, or annex, or use in connection with any goods or services, . . . any false description or representation, including words or other symbols tending falsely

(continued...)

The District Court granted UL's motion for summary judgment. It found that since "UL is not a competitor [of Alflex] and does not engage in activities designed to give it an unfair advantage vis-a-vis a competitor, Section 43(a) does not reach UL's listing of the Carlon product."

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[1](...continued)

> to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such . . . description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person . . . who believes that he is or is likely to be damaged by the use of any such false description or representation.

This Act was amended effective November 1989. We need not decide, however, whether to apply the amended version of section 43(a) to this appeal. The amendment does not affect the district court's or our analysis of this issue.

We agree with the district court. In Halicki v. United Artists Communications, Inc., 812 F.2d 1213 (9th Cir. 1987), we recently limited the scope of actionable conduct under the Lanham Act. There, the plaintiff, a movie producer, contended that the defendants, several movie theater owners, wrongly attached an "R" rating to plaintiff's "PG" movie, thereby adversely affecting plaintiff's profits. We affirmed summary judgment against the plaintiff stating: "The statute is directed against unfair competition. To be actionable, conduct must not only be unfair but must in some discernable way be competitive." Id. at 1214. See also Lamothe v. Atlantic Recording Corp., 847 F.2d 1403 (9th Cir. 1988) (quoting Halicki for the proposition that actionable conduct must be competitive).

Here UL's conduct is not competitive. UL is a non-profit organization set up to promulgate safety

requirements for thousands of electrical products. UL is not in competition with Alflex. Under Halicki, UL's conduct in listing Carlon's product was not competitive and, therefore, not actionable under the Lanham Act. Thus, summary judgment was proper on the Lanham Act claim.

II. Breach of Implied-in-Fact Contract Term

Alflex argues that its Listing Agreement with UL has an implied term obliging UL to list and certify only products meeting appropriate requirements. Alflex contends that the Agreement's references to "listing requirements" imply that the requirements for the evaluated product are the same as the requirements for other products used in the same manner. Alflex believes that UL breached the implied term of its agreement by listing Carlon's product, which is used for some of the same

purposes as Alflex's product, but was not required to meet the same safety standards. Alflex contends that it was denied the opportunity to present extrinsic evidence of applicable industry custom and practice to demonstrate what the parties intended with respect to listing requirements. It therefore insists that summary judgment was improper, because the intent of the parties concerning one of the contract's key terms is a genuine issue of material fact. We disagree.

The district court correctly found the Listing Agreement was "not reasonably susceptible to the additional terms proposed by Alflex."

Alflex relies on Midwest Television, Inc. v. Scott, Lancaster, Mills & Atha, Inc., 205 Cal. App. 3d 442, 252 Cal. Rptr. 573, 579 (1988). In Midwest the court stated that industry custom and practice

evidence is admissible to supply a missing term or aid in interpreting ambiguous contract terms, but may not "alter or vary the terms of the contract." 205 Cal. App. at 451, 252 Cal. Rptr. at 579. Here, however, Alflex does not contend that the terms of the listing agreement are ambiguous in any respect, rather, it seeks to imply a new term controlling UL's listing of other manufacturer's products.

The Listing Agreement between Alflex and UL outlines each party's rights and obligations with respect to UL listing Alflex's products. The contract's references to listing requirements do not suggest in any way that UL's obligations to Alflex are conditioned by its relationship with third parties. As stated above, Alflex is seeking to use custom and practice evidence to imply a term that would control UL's listing of other manufacturer's products. We agree with the district court that "[i]mplied in fact

contract terms cannot be used to so radically alter and expand the underlying agreement." Summary judgment was appropriate on Alflex's claim of breach of implied contractual term.

III. Breach of Implied-in-Law Covenant of Good Faith and Fair Dealing

Alflex asserts that UL breached an implied covenant of good faith and fair dealing in the listing agreement between Alflex and UL by denying Alflex the benefits it reasonably expected from the agreement. Alflex expected that, by obtaining UL certification, that it would gain access to a market restricted to competitors with products that comply with UL's standards for flexible metal conduit. Alflex contends that UL's certification of Carlon's product constitutes breach of the covenant because it forces Alflex to compete against a UL-certified

manufacturer that has not met the standard for flexible metal conduit.

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." (Rest. 2d Contracts, § 205). The obligation imposed is that neither party "do anything to injure the right of [the other party] to receive the benefits of the agreement." Ohashi v. Verit Industries, 536 F. 2d 849, 853 (9th Cir.), cert. denied, 429 U.S. 1004 (1976). However, this implied covenant may not be used to vary or modify the express terms of an unambiguous contract, Ford v. Manufacturer's Hanover Mortgage Corp., 831 F. 2d 1520, 1524 (9th Cir. 1987), but rather "is read into contracts in order to protect the express covenants or promises of the contract." (emphasis added). Foley v. Interactive Data Corp., 47 Cal. 3d

654, 690, 765 P. 2d 373, 394; 254 Cal. Rptr. 211, 232 (1988).

The district court correctly held that the Listing Agreement was unambiguous in its purpose to set forth the terms and conditions governing the Listing of Alflex's products. There is no provision in the contract that addresses any product other than the product submitted by Alflex and there is no term allowing Alflex to question or challenge the Listing of any third party's products. Thus, Alflex was not attempting to use the covenant to protect the express terms of the contract but rather to imply new terms to control UL's Listing of other manufacturer's products. Because the implied covenant is not relevant here, summary judgment was proper.

IV. Negligence Claim

Alflex argues that UL breached a duty of care owed to Alflex by improperly certifying flexible plastic conduit and proximately causing damage to Alflex in the form of unfair competition and lost sales.

For support Alflex relies on J'aire Corp. v. Gregory, 24 Cal. 3d 799, 598 P. 2d 60, 157 Cal. Rptr. 407 (1979). Alflex believes that the application of the six factor analysis set forth in J'aire establishes a duty of care for UL to protect Alflex from competition arising from UL's alleged failure to exercise due care in Listing Carlon's product. The six factors are: 1) the extent to which the transaction was intended to affect the plaintiff; 2) the foreseeability of harm to the plaintiff; 3) the degree of certainty that the plaintiff suffered injury; 4) the closeness of the

connection between the defendant's conduct and the injury suffered, 5) the moral blame attached to defendant's conduct; and 6) the policy of preventing future harm. J'aire, 24 Cal. 3d at 804, 598 P. 2d at 63, 157 Cal. Rptr. at 410.

Although it may have been foreseeable that listing Carlon's product might increase competition in the conduit market, our analysis of all these factors compels us to conclude that the district court properly granted summary judgment for UL on this claim. First, Alflex showed no evidence that UL intended to affect Alflex by listing flexible plastic conduit. UL's purpose is to provide products with safety certification, not to regulate competition between manufacturers of electrical conduits. Additionally, while Alflex alleged $100,000,000 in damages, it has shown no evidence of its purported lost market share or lost profits, thus it is clearly not

"certain" that Alflex has suffered injury. Furthermore, Alflex has presented no convincing evidence that UL's conduct was morally blameworthy or that creating such a duty would prevent future harm. In fact, the district court perceptively noted that creating a duty could potentially cause future harm:

> To impose a duty on UL would mean that every time that UL listed a new product, it would be subject to suit. This would impair the ability of UL to test new products and changing technology in an impartial manner, unbiased by the fear of lawsuits by disgruntled competitors.

Therefore, summary judgment was properly granted.

V. False Advertising and Unfair Competition

Alflex contends that UL engaged in unfair business practices under section 17200 and false advertising under section 17500 of the California Business and Professional Code.[2] Alflex contends

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[2] Cal. Bus. & Prof. Code § 17200 states:

> As used in this chapter, unfair competition shall mean and include unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

Section 17500 reads:

> It is unlawful for any person, firm, corporation, association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate

(continued...)

that UL was unfair in its business practice by applying less stringent standards for certification of flexible plastic conduit, creating undue competitive hardship for Alflex. Further, Alflex contends, UL's certification, when attached to Carlon's product,

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[2](...continued)

> or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, any statement concerning such real or personal property or services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any such person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell such personal property or services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both.

created a false or misleading impression among consumers.

The district court properly held that under Blatty v. New York Times Company, 42 Cal. 3d 1033, 728 P. 2d 1177, 232 Cal. Rptr. 542 (1986), cert. denied, 485 U.S. 934 (1988), Alflex's claims under sections 17200 and 17500 should be dismissed.

In Blatty, the California Supreme Court held that where "the alleged injurious falsehood of a statement is the gravamen of the plaintiff's claim . . . the statement . . . must be 'of and concerning' the plaintiff in some way." Id. at 547. Based on this holding the Court affirmed the dismissal of Blatty's claims under Cal. Bus. & Prof. Code §§ 17200 and 17500. Id. at 552.

We find Blatty controlling in this case because the holding was based on the California Supreme Court's interpretation of article I, section 2, of the California Constitution.[3]

Here, Alflex does not dispute that the gravamen of its unfair competition and unfair business practice claims is the alleged injurious falsehood implied in the UL Listing of Carlon's product. And, we agree with the district court that UL's "speech is not 'of and concerning' alflex." Thus, we hold that the district court's grant of summary judgment on these claims was appropriate.

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[3] In Blatty the court stated that "Throughout this opinion we have used 'First Amendment' to refer not only to that provision of the United States Constitution, but also to article I, section 3 of the California Constitution. It is the latter on which we primarily rely." 42 Cal. 3d at 1049, n. 4, 232 Cal. Rptr. at 552, n. 4, 728 P. 2d at 1187, n. 4.

VI. Cancellation of Mark Under § 14(e) of the Lanham Act

Alflex seeks to cancel registration of UL's certification mark under 15 U.S.C. § 1064(e)(1) (1982)[4] on the grounds that UL has failed to control the mark. However, we agree with the district court that

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[4] The relevant portion of the section reads:

> A verified petition to cancel a registration of mark, stating the grounds relied upon, may, upon payment of the prescribed fee, be filed by any person who believes that he is or will be damaged by the registration of a mark on the principal register established by this chapter, or under the Act of March 3, 1881, or the Act of February 20, 1905 –
>
> * * * *
>
> e) at any time in the case of a certification mark on the ground that the registrant . . . does not control, or is not able legitimately to exercise control over, the use of such mark . . . ."
>
> This section was amended in 1988, but the amendment does not affect the present case.

Alflex produced insufficient evidence of UL's failure to control its mark to warrant cancellation.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALFLEX CORPORATION, Plaintiff-Appellant, vs. UNDERWRITERS LABORATORIES, INC., Defendant-Appellee.	)	No. 89-55440 O R D E R

Before: BROWNING, PREGERSON, Circuit Judges, and MACBRIDE, District Judge*

The panel as constituted above voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of

the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

* The Honorable Thomas J. MacBride, United States District Judge for the Eastern District of California, sitting by designation.

15 U.S.C. § 1125

§ 1125 False designations of origin and false descriptions forbidden

(a) Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely

indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

(b) Any goods marked or labeled in contravention of the provisions of this section shall not be imported into the United States or admitted to entry at any customhouse of the United States. The owner, importer, or consignee of goods refused entry at any customhouse under this section may have any recourse by protest or appeal that is given under the customs revenue laws or may have the remedy given by this chapter in cases involving goods refused entry or seized.

(July 5, 1946, c. 540, Title VIII, § 43, 60 Stat. 441.)

15 U.S.C. § 1125 (As Amended November 16, 1988)

§ 1125 False designations of origin and false descriptions forbidden

(a) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which –

(1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her

goods, services, or commercial activities by another person, or

(2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

(As amended Nov. 16, 1988, Pub.L. 100-667, Title I, § 132, 102 Stat. 3946.)